

# Arbitration Ethics—Is California the Future?

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What do hot tubs, mountain bikes, skateboards, fast food, free love, no-fault divorce, zinfandel wine, personal computers, property tax limits, junk bonds, savings and loan scandals, Richard Nixon, Ronald Reagan, and extreme sports have in common? They were all phenomena that began in California, were viewed with curiosity (if not ridicule) by the rest of the country, and quickly spread from coast to coast. What some consider extreme arbitration ethics may join this list. This article first explains the background and development of legislatively mandated arbitration ethics standards in California, then suggests how this phenomenon could spread and affect the rest of the country. Arbitration reform by way of ethics may have ripened first in California, but the movement is not confined to the Golden State and may provide a preview of what is coming your way.

## I. THE PUSH FOR REFORM

Near the end of September 2001, Governor Gray Davis signed Senate Bill 475, which implemented some “clean-up” reforms for the use of ADR within the judicial system.<sup>1</sup> Added on to the bill was a mandate to the California Judicial Council, the constitutionally created administrative and policy board of the California courts,<sup>2</sup> to create and implement ethics Standards for private arbitrators by July 1, 2002. Violation of the ethics Standards was to be grounds for disqualification of the arbitrator and vacatur of the arbitration award.<sup>3</sup> The political momentum resulting in the mandate to the Judicial Council was the result of public concern about the proliferation of pre-dispute arbitration clauses in consumer, health care, and employment

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<sup>1</sup> These reforms were proposed the previous year by a Judicial Council Task Force, the Quality of Justice-Subcommittee on ADR and the Judicial System, which this author chaired. The report of the Task Force is *available at* <http://www.courtinfo.ca.gov/reference/documents/adrreport.pdf>.

<sup>2</sup> See CAL. CONST. art. VI, § 6.

<sup>3</sup> S.B. 475, 2001 Leg., Reg. Sess. (Cal. 2001), *available at* [http://www.leginfo.ca.gov/pub01-02/bill/sen/sb\\_0451-0500/sb\\_475\\_bill\\_20010827\\_amended\\_asm.pdf](http://www.leginfo.ca.gov/pub01-02/bill/sen/sb_0451-0500/sb_475_bill_20010827_amended_asm.pdf), now CAL. CIV. PROC. CODE § 1281.85 (West Supp. 2002).

contracts. These non-negotiated agreements to arbitrate all future disputes, imbedded in contracts that are offered on a "take it or leave it basis," curtail any meaningful opportunity to pursue a claim in court and limit the right to be part of a class action lawsuit.<sup>4</sup> (These applications of mandatory pre-dispute arbitration clauses will be referred to collectively as "consumer arbitrations.") Plaintiffs' attorneys have long opposed pre-dispute arbitration clauses and, along with consumer advocates, have lobbied for restrictions on their use. Legislative and judicial efforts to directly limit arbitration have been thwarted by the shield provided by the Federal Arbitration Act<sup>5</sup> and the Supremacy Clause.<sup>6</sup>

A series of articles published last year in the San Francisco Chronicle<sup>7</sup> highlighted how arbitration provider organizations promoted the use of pre-dispute arbitration clauses in which they were designated as arbitration providers. Accusations were made about financial ties between provider organizations and repeat users of their services, suggesting favorable outcomes went to those users creating an inflow of cases. The series featured consumer arbitration horror stories, which, along with indignant editorials, added to the sense of public outrage against "involuntary" arbitration. Limiting arbitration to "consenting adults" was, and still is, an appealing theme. The call for reform, however, does not always distinguish between arbitration resulting from contracts of adhesion and commercial agreements. The noble cause of enhancing public confidence in arbitration by tightening arbitrator ethics is enlisted not only to constrict imposing arbitration when

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<sup>4</sup> Some predispute consumer arbitration clauses specifically bar class actions. For an interesting debate on the use of pre-dispute arbitration clauses to prevent class actions, see Carroll Neesemann & Jean Sternlight, *Should an Arbitration Provision Trump the Class Action?*, DISP. RESOL. MAG., Spring 2002, at 13; see also, Richard Jeydel, *Consolidation, Joinder and Class Actions: What Arbitrators and Courts May and May Not Do*, Nov. 2002–Jan. 2003, 24. The Ninth Circuit Court of Appeals recently declared AT&T's customer contracts in California to be "unconscionable" because in addition to mandatory arbitration the consumer contracts bar class actions. *Ting v. AT&T Corp.*, No. 02-15416, 2003 WL 292296 (9th Cir. Feb. 11, 2003). This ruling is in conflict with the Seventh Circuit decision in *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002). The U.S. Supreme Court will hear a case that could determine whether there can be a class arbitration when a consumer predispute arbitration clause is silent on the matter. *Green Tree Financial Corp. v. Bazzel*, 123 S.Ct. 817 (2003). See Justin Kelly, *Supreme Court Grants Review in Class Arbitration Case* (Jan. 15, 2003), available at <http://www.adrworld.com>.

<sup>5</sup> Federal Arbitration Act 9 U.S.C. §§ 1–307 (2000).

<sup>6</sup> See, e.g., *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686–88 (1996).

<sup>7</sup> *Reynolds Holding, Private Justice: Millions are losing their rights*, (pts. 1–3) S.F. CHRON., Oct. 7, 2001, at A1; Oct. 8, 2001, at A15; Oct. 9, 2001, at A13.

only one side wishes to proceed down the arbitration path, but also to assure publicly created Standards in a system of unregulated “private justice.”<sup>8</sup>

## II. THE ROLE OF THE JUDICIAL COUNCIL AND BLUE RIBBON PANEL

The Judicial Council was mandated by Senate Bill 475 to adopt ethics Standards that:

- Apply to neutral arbitrators;
- Expand, but do not limit, existing statutory disclosure and disqualification requirements;<sup>9</sup>
- Are consistent with the standards for judicial arbitrators;<sup>10</sup> and
- Address all of the specific topics listed in the bill, including disclosure of past service as a dispute resolution neutral for any party or attorney, other interests, relationships and affiliations that may constitute conflicts of interest, as well as “establishment of future professional relationships,” and acceptance of gifts.<sup>11</sup>

Although much of the criticism of arbitration focuses on the perceived conflicts of interests created by arbitration provider organizations, the direct regulation of provider organizations is beyond the legislative charge of the Judicial Council because regulating private organizations is not within the general authority of the Council. Thus, the Judicial Council, pursuant to Senate Bill 475, focused on standards for arbitrators and what arbitrators must disclose, not on specific acts provider organizations could or could not do. This assignment created a new role for the Council in the regulation of private professional practice, and it raised questions about delegation to the judicial branch of a legislative function.<sup>12</sup> The legislation also created an abbreviated timeline for the Council, which would normally otherwise allow more time for comment before implementing its rules.<sup>13</sup>

The Chief Justice, who chairs the Judicial Council, appointed a nineteen person “Blue Ribbon Panel of Experts on Arbitration Ethics” to assist the Council in its task of creating ethics Standards for private arbitrators. The

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<sup>8</sup> Ethics Standards, particularly disclosure requirements, are less likely to be ruled in conflict with the pro-arbitration policy of the FAA. *See Commonwealth Coatings Corp. v. Continental Cas Co.*, 393 U.S. 145, 148–49 (1968).

<sup>9</sup> CAL. CIV. PROC. CODE § 1281.9 (West Supp. 2002).

<sup>10</sup> Extensive disclosures had been implemented for judicial arbitrators without much concern by the arbitration community because of the limited use of judicial arbitration, its non-binding nature, and the minimum compensation involved. *See* CAL. R. CT., CANON 6D (West 2002), applicable to judicial arbitrators.

<sup>11</sup> *See* CAL. CIV. PROC. CODE § 1281.85 (West Supp. 2002), which codifies the requirements set forth in S.B. 475, 2001 Leg., Reg. Sess. (Cal. 2001).

Panel consisted of professional arbitrators, judges, consumer advocates, legislative Judicial Committee staff, a corporate representative, the legal advisor to the Governor, and academics, one of who was appointed to chair the Panel.<sup>14</sup> The Panel had no authority other than to advise the drafters (the Judicial Council's staff lawyers assigned to draft the Standards<sup>15</sup>), comment to the Council, and hold public hearings for additional input on initial drafts of the Standards. It appears that the panelists were chosen to bring to the table a diversity of experience and views, not necessarily to reach consensus. Some of the individuals on the Panel supported the creation of arbitration ethics Standards by the Judicial Council; however, others did not.

### III. DRAFTING MINIMUM REQUIREMENTS

The panelists and drafters agreed, however, that the new Standards should be written as minimum requirements rather than as aspirational goals. The reason for this decision was that, unlike the existing standards that were promulgated by voluntary associations and private entities,<sup>16</sup> the Council's Standards would have the force of law in setting grounds for disqualification of arbitrators and vacatur of awards. Therefore, the Standards were to establish a floor of required, enforceable disclosures and ethical conduct, not an aspirational listing of best practices.

Many of the proposed Standards were not controversial, even though some panelists questioned the wisdom of including them. For example, establishing a general duty of impartiality,<sup>17</sup> although not as simple as it might seem, presented no division between panelists. Similarly, the duty to

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<sup>12</sup> See Francis O. Spalding, *Back-Channel Access*, S.F. DAILY J., Mar. 25, 2002, at 4.

<sup>13</sup> The short timeline was exacerbated by the Council's preset bi-monthly meeting schedule, which could not be changed. As a consequence, some bar associations and professional organizations could not process comments quickly enough to present to the Council.

<sup>14</sup> Chief Justice George appointed this author to chair the panel.

<sup>15</sup> The senior staff lawyer with principal drafting responsibility was Heather Anderson, an extraordinarily capable attorney who attempted to accommodate all panelists' suggestions, which were sometimes in conflict.

<sup>16</sup> See, e.g., AAA/ABA Code of Ethics for Commercial Arbitrators (1977), available at [http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPsrc=upload\LIVESITE\Rules\\_Procedures\Ethics\\_Standards\code.html](http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPsrc=upload\LIVESITE\Rules_Procedures\Ethics_Standards\code.html); JAMS Ethics Guidelines for Arbitrators (2002), available at [http://www.jamsadr.com/ethics\\_for\\_arbs.asp](http://www.jamsadr.com/ethics_for_arbs.asp).

<sup>17</sup> CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION § 5 (2003), available at [http://www.courtinfo.ca.gov/rules/amendments/arb\\_eth03.pdf](http://www.courtinfo.ca.gov/rules/amendments/arb_eth03.pdf).

refuse gifts and favors<sup>18</sup> posed no disagreement in concept, even though the Panel struggled with a definition of gifts and favors.<sup>19</sup> There also was no controversy over basic Standards for the conduct of arbitrations,<sup>20</sup> *ex parte* communications,<sup>21</sup> confidentiality,<sup>22</sup> a ban on contingency fees and a requirement that all fees must be clearly explained in writing before appointment of the arbitrator,<sup>23</sup> truthfulness in advertising, and a ban on representations implying favoritism or solicitation of business from current participants.<sup>24</sup>

#### IV. ARBITRATOR DISCLOSURES

The greatest diversion of views, and the most controversial Standards, were on the topic of arbitrator disclosure. Some panelists urged requiring disclosure of all information that could potentially indicate repeat player bias and financial motivation by the arbitrator or the provider organization to favor one side. Other panelists were concerned that complex and burdensome absolute disclosure requirements, violation of which could be grounds for vacatur of awards, would encourage collateral litigation undermining the finality of arbitration and would threaten the speed and cost-effectiveness of arbitration as a viable alternative to litigation. There was also fear of creating arbitrator liability for inadvertent failure to disclose. The mantra of the consumer advocates and public representatives on the Blue Ribbon Panel was that “public confidence in arbitration is undermined by allowing the powerful to impose the process on the less powerful and by not requiring disclosure of information showing potential arbitrator bias in favor of the imposer.” The double mantra of arbitrators on the Panel was “beware of unintended consequences” and “don’t throw the baby out with the bath water.” The initial draft contained very complex and densely worded disclosure requirements for all arbitrations, and there was intense

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<sup>18</sup> *Id.* § 11.

<sup>19</sup> This duty has been previously framed by the Judicial Council ADR Task Force in its response to public concerns about the lack of restrictions on acceptance of gifts by retired judges serving as private neutrals. *See* proposed CAL. R. CT., CANON 6G, in ADR Task Force Report, *supra* note 1; *see also* CAL. R. CT., CANON 6D (West 2002), which bans gifts to Judicial Arbitrators.

<sup>20</sup> CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 17, § 13.

<sup>21</sup> *Id.* § 14.

<sup>22</sup> *Id.* § 15.

<sup>23</sup> *Id.* § 16.

<sup>24</sup> *Id.* § 17.

disagreement among the panelists about the appropriate balance between competing priorities.

One can share the concern about imposing the use of arbitration in consumer claims and still oppose burdening commercial arbitration with cumbersome requirements that can be used for mischief by a disappointed party who wants to disqualify an arbitrator when the proceeding is either not going well or has produced an adverse result. Therefore, the Panel agreed to separate consumer arbitration from other arbitrations with respect to the application of the most stringent new arbitrator disclosure requirements.<sup>25</sup> This distinction did not produce unanimity on the specifics of the disclosure Standards, but did allow less intense disagreement between well-intentioned panelists who understood the concerns and arguments of both sides.

The most debated proposal adopted was that requiring the arbitrator in consumer arbitrations to disclose information relating to the provider organization.<sup>26</sup> The disclosable information includes past, present, or expected financial or professional relationships and affiliations, or agreements to provide dispute resolution services or consulting to any party, lawyer in the arbitration, or lawyer's law firm, as well as administration of dispute resolution services to any current party or lawyer in the arbitration. If any such relationship between a party or lawyer and the provider organization is disclosed, then the arbitrator must also disclose the provider organization's process and criteria for recruiting, training, and screening arbitrators,<sup>27</sup> as well as the process for identifying, recommending, and selecting potential arbitrators for specific cases.<sup>28</sup> It was strongly argued in opposition to this disclosure requirement that this type of information was information to which the arbitrator may not be privy and which would not serve to distinguish, for individual selection purposes, arbitrators who were on the same provider's panel. Other disclosures required in consumer cases focus on the relationship between the arbitrator and the provider organization, including any financial arrangement or affiliation with the

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<sup>25</sup> For an article articulating the distinction, see, for example, Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 760-67 (2001).

<sup>26</sup> The disclosures required in consumer arbitrations were contained in Standard 7(b)(12) when adopted by the Judicial Council. However, before the specific requirements in consumer arbitrations were to become effective on Jan. 1, 2003, the Council amended the Standards, including renumbering and moving to Standard 8 the disclosures required in consumer arbitrations administered by a provider organization.

<sup>27</sup> CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 17, § 8(c)(2).

<sup>28</sup> *Id.* § 8(c)(3).

provider.<sup>29</sup> Provider organization disclosures (through the medium of the individual arbitrator) were adopted by the Council following some softening modifications, including delaying the implementation of the required additional disclosures in consumer cases until January 1, 2003.<sup>30</sup> These disclosure requirements were then amended prior to January 1, 2003, as further explained in this article.<sup>31</sup>

Only a few of the many categories of information that must be disclosed by the arbitrator pursuant to the Standards are limited to consumer arbitrations. One of the more controversial new disclosure requirements is the arbitrator's policy regarding acceptance of new employment as a neutral from any current party, lawyer, or lawyer's firm.<sup>32</sup> The concern addressed is the appearance of favoritism by booking additional business from a current participant. Disclosure that such new employment will be accepted is grounds in the Standards for disqualification. However, if the arbitrator is not initially disqualified based on willingness to accept new employment, no further disclosure relating to the acceptance of a new case need be made.<sup>33</sup>

The new requirement of stating not only the potential conflicting interests of spouses, but also those of domestic partners<sup>34</sup> and former spouses currently associated with a firm or lawyer in the arbitration, prompted questions about ongoing disclosure requirements, changing relationships, and privacy.<sup>35</sup> Some other newly required disclosures that caused concern involved the disclosure of mediations or other neutral services provided to

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<sup>29</sup> *Id.* § 8(c)(1).

<sup>30</sup> The other modifications included: allowing disclosure by reference of the required information posted on the provider's web site, limiting provider case information to the prior two years, not requiring the listing of prior cases administered for other lawyers in the appearing lawyer's firm, not requiring the arbitrator to amend provider related information disclosed as part of the arbitrator's continuing duty to inform, and allowing the arbitrator to rely on information supplied by the provider organization.

<sup>31</sup> See *infra* notes 81–83 and accompanying text.

<sup>32</sup> CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 17, § 10(b).

<sup>33</sup> *Id.* § 12(d). When initially adopted by the Judicial Council this Standard made a distinction for consumer cases. In consumer cases, even if the arbitrator was not disqualified initially for willingness to accept new employment from current participants, he or she would have been required to disclose any new case offer from current participants (or their law firms) and obtain permission to accept. However, as will be explained later, this Standard was amended before it became effective on Jan. 1, 2003.

<sup>34</sup> *Id.* § 2(n). "Domestic Partner" is defined in CAL. FAM. CODE § 297 (West 2002).

<sup>35</sup> CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 17, § 7(d)(2)(C).

current arbitration participants during the past two years.<sup>36</sup> If the arbitrator was paid and rendered a decision as a temporary judge or referee, involving a participant, detailed disclosures need to be provided, including the monetary damages awarded.<sup>37</sup> The previous requirement is augmented when there are more than five such instances. In that situation, a written summary that includes the number of cases in which a party or lawyer in the current case has prevailed is also required.<sup>38</sup> This raised questions about written disclosure burdens and definitions of “prevailing party.”<sup>39</sup>

The other disclosure requirements that have generated comments from arbitrators are mandated by either the pre-existing statutory requirement that arbitrators disclose anything for which a judge may be disqualified<sup>40</sup> or the new statutory addition that arbitrator disclosure requirements be consistent with disclosures required of judicial arbitrators.<sup>41</sup> For example, requiring selected disclosure information about the employment<sup>42</sup> of an arbitrator’s extended family (which includes grandchildren, great-grandchildren, grandparents, great-grandparents, nieces, nephews, domestic partners or the spouse of such person) seemed to some like a trap for those with large or changing families.<sup>43</sup> This disclosure requirement was mandated because

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<sup>36</sup> *Id.* § 7(d)(5). As initially adopted by the Judicial Council, the past ADR services that were required to be disclosed included *pro bono* assignments for courts or community programs. Many commentators expressed concern about how this would discourage *pro bono* services. The disclosure requirement was amended effective Jan. 1, 2003, to include only compensated ADR services.

<sup>37</sup> *Id.* § 9(d)(5)(B)(iii).

<sup>38</sup> *Id.* § 7(d)(5)(C)(iv).

<sup>39</sup> “Prevailing party” is not defined in the Standards, but the applicable definition can be found in CAL. CIV. PROC. CODE § 1032(b) (West Supp. 2002).

<sup>40</sup> CAL. CIV. PROC. CODE § 1281.9(a)(1) (West Supp. 2002) requires arbitrators to disclose “[t]he existence of any ground specified in Section 170.1 for disqualification of a judge.”

<sup>41</sup> S.B. 475, 2001 Leg., Reg. Sess. (Cal. 2001) is now CAL. CIV. PROC. CODE § 1281.85 (West Supp. 2002). The required disclosures for judicial arbitrators were recently expanded without significant opposition because judicial arbitrators’ compensation is limited, and their decisions are not binding.

<sup>42</sup> Serving as an officer, director, or trustee of a party, and working as an associate in a private law practice with a lawyer in the arbitration are both included.

<sup>43</sup> During a public hearing in Los Angeles on Feb. 7, 2002, a retired judge (who arbitrates) noted the burden of extended family disclosure because his six children were lawyers, and three were also married to lawyers. The burden on the arbitrator of being informed about external family and former spouses was softened by a “safe harbor” amendment to the Standards which only requires the arbitrator to seek information from



judges in California can be disqualified from a case if “a person within the third degree of relationship” to the judge or the judge’s spouse is so employed.<sup>44</sup> The same mandate exists for disclosure about a “former spouse” who is associated in the practice of law with an attorney in the arbitration.<sup>45</sup>

The new requirement of disclosing arbitrator membership in an organization that practices discrimination<sup>46</sup> is consistent with the laudatory disclosure requirement for judicial arbitrators in California;<sup>47</sup> however, the new requirement carries with it different consequences. For example, a judicial arbitrator’s decision is not binding if a party requests a trial *de novo*,<sup>48</sup> so vacatur need not be sought by a disappointed party, and the only consequence of failing to disclose membership in a discriminatory organization is the possibility of a sanction against the judicial arbitrator or removal from the court’s list.<sup>49</sup> In contrast, failure of a contractual arbitrator to disclose membership in a discriminatory organization provides an apparent trump card for disqualification or vacatur of an otherwise binding arbitration award after a costly proceeding is already underway, or has been completed. Since there is no required showing of bias or relevancy in the case, the motion for vacatur can, presumably, be made by a party who shares the same discriminatory philosophy as the arbitrator, even if vacatur is to the detriment of an opponent who may be part of the discriminated class.

Interestingly, comments and objections were received with respect to some of the written disclosures that have been required of arbitrators since 1994.<sup>50</sup> The drafters’ reasonable decision to consolidate the text of all the existing arbitrator disclosure requirements in one codified place made the combined new and existing requirements appear daunting and has subjected the new disclosure requirements to blame for the consequences of the already

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those living in his or her household. See CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 17, § 9(b).

<sup>44</sup> CAL. CIV. PROC. CODE § 170.1(a)(4) (West Supp. 2002).

<sup>45</sup> CAL. CIV. PROC. CODE § 170.1(a)(5) (West Supp. 2002).

<sup>46</sup> California Ethics Standards for Neutral Arbitrators in Contractual Arbitration, *supra* note 17, § 7(b)(13). But see “safe harbor” provision § 9(b), as described *supra* note 43.

<sup>47</sup> CAL. R. CT., CANON 6D(2)(g) (West 2002).

<sup>48</sup> See CAL. CIV. PROC. CODE § 1141.18(a) (West Supp. 2002).

<sup>49</sup> However, if a judicial arbitration award is entered without objection, it may be set aside for later discovered non-disclosure. See CAL. R. CT. 1615(d) (West 2002).

<sup>50</sup> See, e.g., CAL. CIV. PROC. CODE § 1281.9 (West Supp. 2002) (requiring disclosures about arbitrations during the past five years involving any current participants, including: the results of each case, the prevailing party, names of attorneys, and the amount of monetary damages awarded).

existing requirements.<sup>51</sup> The sheer collective volume of disclosure requirements is enough to make a conscientious arbitrator nervous, and provide a disappointed lawyer potential ammunition with which to pursue another try or an improved negotiated outcome.

It should be noted, however, that the new Standards expressly do not apply to party arbitrators, international arbitration proceedings, judicial arbitrations, attorney-client fee arbitrations, automobile warranty disputes, worker's compensation disputes, and arbitrations arising under collective bargaining agreements.<sup>52</sup> The Standards contain no provision prohibiting waiver by the parties, except for Standard 6 requiring an arbitrator to decline appointment if unable to be impartial. The use of written waivers regarding the new disclosure requirements is already being utilized regularly in certain types of consumer arbitrations in California<sup>53</sup> and is likely to be challenged.

## V. THE AFTERMATH

The warning expressed about unintended consequences flowing from the Standards has already come true.<sup>54</sup> Application of the Standards to securities related arbitrations was quickly challenged by a suit in Federal Court filed by the National Association of Securities Dealers (NASD) and the New York Stock Exchange only days after the Standards took effect.<sup>55</sup> This lawsuit against the California Judicial Council was dismissed on Eleventh Amendment grounds.<sup>56</sup> The NYSE and the NASD also stopped appointing

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<sup>51</sup> S.B. 475, 2001 Leg., Reg. Sess. (Cal. 2001), codified as CAL. CIV. PROC. CODE § 1281.9 (West Supp. 2002), [see *supra* note 9 and accompanying text] prohibits limiting all existing arbitrator disclosure requirements.

<sup>52</sup> CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 17, § 3(b).

<sup>53</sup> See *infra* note 59 and accompanying text.

<sup>54</sup> See Ruth V. Glick, *California's New Ethical Standards for Neutral Arbitrators in Contractual Arbitration...The Danger of Unintended Consequences*, DISP. RESOL. MAG., Fall 2002, at 14-15.

<sup>55</sup> The case was filed in the United States Court for the Northern District of California. Several judges to whom the case was assigned recused themselves before the matter was assigned to Senior Judge Samuel Conti. The complaint, dated July 22, 2002, can be viewed at [http://www.nasdr.com/pdf-text/072202\\_ca\\_complaint.pdf](http://www.nasdr.com/pdf-text/072202_ca_complaint.pdf).

<sup>56</sup> Jeff Chorney, *Judicial Council Suit Dismissed*, RECORDER, Nov. 13, 2002, at 1; Reynolds Holding, *Rules for Arbitrators Upheld*, S.F. CHRON., Nov. 13, 2002, at A23. Judge Conti noted in his dismissal decision that "[b]ecause the state law depends upon private implementation, plaintiffs will be unable to find a government defendant to sue and will have no choice but to wait for other parties to assert these arguments as defenses against the vacatur of an arbitration award."

arbitrators to hear complaints in California, which prompted a formal complaint to be filed with the Securities and Exchange Commission by California Senate President *pro tem* John Burton and California Senator Martha Escutia, accusing the NYSE and NASD of illegally refusing to proceed with California complaints.<sup>57</sup> In addition, two elderly and terminally ill women filed suit to force the NASD to appoint an arbitration panel in California to hear their securities dispute, claiming breach of their contract requiring arbitration. An arbitration panel was appointed and the women's suit was dismissed because the women signed a waiver of the Judicial Council's arbitrator ethics Standards.<sup>58</sup> The NASD and the NYSE resumed administering arbitrations in California, provided that the plaintiffs waive application of the California ethics Standards.<sup>59</sup> However, this practice of compelling claimants to arbitrate and then proceeding only if the claimant waives application of the Standards has now been challenged in federal court.<sup>60</sup>

Professional arbitrators and provider organizations generally believe the ethics Standards go too far, while consumer groups and plaintiffs' attorneys feel the Standards do not go far enough. Arbitrators argue that it is not appropriate for the Judicial Council to set rules or Standards for private arbitrators and if any regulation of provider organizations is necessary, it should come from the legislature.<sup>61</sup> The California legislature obliged. It passed six arbitration bills that focus on arbitration provider organizations. Five of these bills were signed by the Governor, which garnered front-page newspaper coverage.<sup>62</sup>

These arbitration reform bills disqualify sitting judges from assignment to certain cases if the judge has had discussions with a provider organization about post-retirement ADR work,<sup>63</sup> prohibit ADR companies from having

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<sup>57</sup> Mike McKee, *Council Responds to Arbitration-Rule Suit*, RECORDER, Aug. 20, 2002, at 1.

<sup>58</sup> Justin Kelly, *NASD Agrees to Take California Case Without Meeting Ethics Code: Parties Agree to Waiver of New Disclosure Requirements* (Sept. 13, 2002), at <http://www.adrworld.com>.

<sup>59</sup> Jeff Chorney, *Stock Exchange Says It Will Skirt ADR Standards*, RECORDER, Nov. 14, 2002, at 1.

<sup>60</sup> *Mayo v. Dean Witter Reynolds, Inc.*, No. 01-CV-20336, USDC (ND Cal. 2003). See CPR Institute for Dispute Resolution, *Goin' Cali: Neutrals, Providers Settle in with New Rules and Laws*, 21 ALTERNATIVES 1, 16 (Jan. 2003).

<sup>61</sup> See, e.g., Spalding, *supra* note 12.

<sup>62</sup> See, e.g., Reynolds Holding, *Consumers get arbitration help: Breakthrough laws lift secrecy, root out conflicts of interest*, S.F. CHRON., Oct. 2, 2002, at A1.

<sup>63</sup> A.B. 2504, 2002 Leg., Reg. Sess. (Cal. 2002).

investments or financial relationships with parties whose consumer arbitrations it administers,<sup>64</sup> limit consumer arbitration fees, prohibit “loser pays for arbitration” provisions,<sup>65</sup> and require provider organizations to collect and make available extensive data on consumer arbitrations and outcomes.<sup>66</sup> The Governor vetoed a bill that would have required provider organizations to disclose consulting work, solicitation, and financial relationships with any company related to a party in a consumer arbitration, and that would have allowed consumers to choose another provider than the one named in a pre-dispute arbitration provision.<sup>67</sup>

The drafters of the new ethics Standards were aware of the intention of some legislators to place disclosure burdens directly on arbitration provider organizations,<sup>68</sup> which could have mooted the felt need to require these disclosures from arbitrators. However, Senate Bill 475, which mandated the arbitrator ethics Standards, required that such Standards be implemented by July 1, 2002. This necessitated Judicial Council action well before July.<sup>69</sup> The California legislature would not conclude its session until the end of August 2002, so approval of the ethics Standards could not await the end of the legislative session. In order to reconcile this dilemma, as well as to respond to other concerns regarding the abbreviated time for comment and implementation, the Judicial Council delayed implementation of the specific Standard requiring provider related disclosures in consumer cases to January 1, 2003.<sup>70</sup> This delay was intended to allow the Judicial Council more time to consider amending the consumer orientated disclosure provisions of the ethics Standards until after the Governor’s action on the bills then pending.

The American Arbitration Association (AAA) indicated that it would not be able to provide the information required by the Standards and the new

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<sup>64</sup> A.B. 2574, 2002 Leg., Reg. Sess. (Cal. 2002).

<sup>65</sup> A.B. 2195, 2002 Leg., Reg. Sess. (Cal. 2002).

<sup>66</sup> A.B. 2656, 2002 Leg., Reg. Sess. (Cal. 2002).

<sup>67</sup> A.B. 3029, 2002 Leg., Reg. Sess. (Cal. 2002). This vetoed bill also included definitions applicable to other consumer arbitration bills that were signed and will become law, but with no definition of key phrases like “consumer arbitration.”

<sup>68</sup> See, e.g., Editorial, *On Arbitration Reform: Unfinished Business*, S.F. CHRON., April 28, 2002, at D4.

<sup>69</sup> Judicial Council meetings are normally two to three months apart, and new rules require circulation and time for comment prior to implementation.

<sup>70</sup> Presumably this delay, which is in violation of the express legislative mandate, was done with the approval of the sponsors of S.B. 475, 2001 Leg., Reg. Sess. (Cal. 2001).

laws on consumer arbitrations.<sup>71</sup> In commenting to its arbitrators on two of the bills then on the Governor's desk and urging his veto, the AAA stated that the bills create "burdens and costs that are either impossible or too costly for the AAA to remain in service for this segment of our work in California."<sup>72</sup> The San Francisco Chronicle reported in a front page story that the AAA "has threatened to pull out of California if he [the Governor] signs two of the more stringent bills."<sup>73</sup> The situation then got worse for the AAA. The president of the AAA submitted op-ed articles to newspapers that were critical of trial lawyers who supported the legislation.<sup>74</sup> In response, the San Francisco Trial Lawyers Association announced a boycott of the AAA and called on other groups of plaintiffs' lawyers to do the same.<sup>75</sup> The Consumer Lawyers of California, which has more than 5,000 members, later voted to boycott AAA.<sup>76</sup> A few prominent AAA panelists felt the published comments from the AAA chief executive compromised their neutrality as AAA panelists and resigned.<sup>77</sup> The most prominent of the AAA panelists that resigned because of the comments of its president joined JAMS,<sup>78</sup> a national arbitration provider organization, which has enhanced its disclosure forms and computerized its information tracking system in order to comply with the California requirements and has remained neutral on the California arbitration legislation.<sup>79</sup>

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<sup>71</sup> Letter to Judicial Council from William K. Slate II, President AAA, Feb. 21, 2002.

<sup>72</sup> Memo to Panel of Neutrals, California, from William K. Slate, President AAA, Sept. 3, 2002.

<sup>73</sup> Reynolds Holding, *Arbitration Protection Bills on Davis' Desk: 7 Measures Give California Consumers Strongest Safeguards in the Nation*, S.F. CHRON., Sept. 5, 2002, at A1. The AAA later indicated that it intends to update its database in order to comply with the new California ethics Standards and consumer arbitration laws. John Ryan, *Spin City*, S.F. DAILY J., Dec. 23, 2003, at Extra 10.

<sup>74</sup> William K. Slate II, Letter to the Editor, *Trial-lawyer Gift*, S.F. CHRON., Sept. 9, 2002, at A20; William K. Slate II, Commentary, *The Justice-at-a-Price Guys Take Aim at Arbitration*, L.A. TIMES, Aug. 13, 2002, at B13.

<sup>75</sup> Alexi Oreskovic, *S.F. Trial Lawyers Boycott AAA Over Statements*, RECORDER, Oct. 8, 2002, at 2.

<sup>76</sup> Donna Domino, *CAOC Votes to Boycott Leading Firm of Arbitrators*, RECORDER, Nov. 19, 2002, at 7.

<sup>77</sup> Alexi Oreskovic, *AAA Mediator Quits Over Op-ed Comments*, RECORDER, Oct. 14, 2002, at 1; see also Erik Cummins & John Ryan, *AAA Rumpus Said to be Just Starting*, RECORDER, Oct. 16, 2002, at 7.

<sup>78</sup> Alexi Oreskovic, *Ex-AAA Mediator Moves Over to JAMS*, RECORDER, Nov. 1, 2002, at 9.

<sup>79</sup> Conversation with John Welsh, JAMS General Counsel (Sept. 6, 2002).

The Judicial Council, in response to concerns voiced by its Panel of Experts and others about the limited time for public comment on the Standards, and because of its desire to benefit from further input, had, upon initially adopting the Standard, invited additional public comment, "particularly in light of arbitrator's experience with implementing the [S]tandards."<sup>80</sup> The Council then after considering comments and recommendations,<sup>81</sup> as well as the effect of the new consumer arbitration laws described above,<sup>82</sup> amended the Standards.<sup>83</sup>

Although it was anticipated that the package of new laws<sup>84</sup> requiring provider organizations to make information available in consumer arbitrations would obviate the need for individual arbitrators to disclose information about the provider organization's relationship with parties or attorneys in the arbitration, it was not to be. The Governor's veto of Assembly Bill 3029<sup>85</sup> resulted in the new consumer arbitration laws neither prohibiting or requiring direct disclosure by provider organizations of most of the relationships that must be disclosed by arbitrators under Standard 8(b) in consumer arbitrations.<sup>86</sup> Thus, the amended Standards require individual arbitrators to make disclosures about provider organizations relationships.<sup>87</sup>

The Standards are likely to be revised further as experience with them grows and perhaps, as court challenges require. As indicated by the process

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<sup>80</sup> Memorandum from Melissa Johnson, Assistant General Counsel, Judicial Council of California, and Heather Anderson, Senior Attorney, Judicial Council of California, to all interested persons and entities (May 16, 2001) (on file with author).

<sup>81</sup> See, e.g., Letter from Ruth V. Glick, President, California Dispute Resolution Council, to Romunda Price, Judicial Council of California (Sept. 4, 2002), *available at* <http://www.cdrc.net/pg22.cfm>.

<sup>82</sup> See *supra* notes 63–67 and accompanying text.

<sup>83</sup> The Council voted on the amendments Dec. 13, 2002. The amendments became effective Jan. 1, 2003, the same day that the new consumer arbitration laws went into effect. See CPR Institute for Dispute Resolution, *supra* note 60. The amendments included reorganizing and renumbering the disclosure requirements. The references in this Article are to the amended standards as effective Jan. 1, 2003.

<sup>84</sup> See *supra* notes 63–67 and accompanying text.

<sup>85</sup> See *supra* note 67 and accompanying text. A.B. 3029 would have required provider organizations to disclose consulting work, solicitation and financial relationships with related parties and lawyers in consumer arbitrations.

<sup>86</sup> See Report Summary to Members of the Judicial Council from Michael Bergeisen, et al., Dec. 3, 2002, at 6 (on file with author). CAL. CIV. PROC. CODE § 1281.85 (West Supp. 2002) (S.B. 475) requires disclosure of certain relationships with provider organizations. See *supra* note 11 and accompanying text.

<sup>87</sup> See CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 17, § 8(b).

of their birth, the Standards are probably not totally immune from political and special interest influences.

## VI. CALIFORNIA DREAMIN' OR NATIONAL TREND?

Is the backlash to the proliferation of nonbargained pre-dispute arbitration clauses and the resulting reforms unique to California, or is this the beginning of a national trend? Californians like to think of their state as a trendsetter or prototype of what is new and upcoming. Others may see California as the laboratory for weird and bad ideas.

The sentiments and concerns prompting these reforms are serious and not unique to California; they just took root in the California political soil earlier than elsewhere. National news magazines feature articles on the proliferation of "mandatory" arbitration and highlight dissatisfaction with mandatory arbitration clauses foreclosing public trials.<sup>88</sup> Law review articles, generally critical of "take it or leave it" pre-dispute arbitration clauses, have proliferated.<sup>89</sup> Consumer advocates and plaintiffs' lawyers, who have championed the California legislation mandating these arbitration ethics Standards, as well as other more direct legislative attacks on the enforcement of pre-dispute arbitration clauses, are part of national organizations with national agendas.<sup>90</sup> These advocates and lawyers make no secret of their desire to hamper or eliminate "mandatory" arbitration nationwide.<sup>91</sup> Many bills to limit the use of pre-dispute arbitration clauses in adhesion contracts by amending the Federal Arbitration Act have been introduced in the United States Congress.<sup>92</sup> A new federal law that became effective November 2,

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<sup>88</sup> See, e.g., Charles Haddad & Aixa M. Pascual, *When You Want to Sue—But Can't*, BUS. WK., June 10, 2002, at 46.

<sup>89</sup> See, e.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1240–42 (2001); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 643 (1996).

<sup>90</sup> The president of Consumers Union wrote that "[i]n California, Consumers Union has been instrumental in helping to develop a code of ethical standards for neutral arbitrators. Once adopted, this code could be a model for state governments . . ." Jim Guest, *Memo to Members: Losing Your Day in Court*, CONSUMER REPORTS, June 2002, at 7.

<sup>91</sup> Robert Cartwright, president of the Consumer Attorneys of California, referring to the boycott of the AAA over its support of mandatory arbitration is quoted as stating "various boards around the country will be looking at this and taking similar action." Ryan, *supra* note 73.

<sup>92</sup> See, e.g., H.R. 540, 108th Cong. (Introduced Feb. 5, 2003); Preservation of Civil Rights Protections Act of 2002, S. 2435, 107th Cong. § 3 (2002); Preservation of Civil

2002, invalidates predispute arbitration clauses in contracts involving automobile franchises unless after the controversy arises both parties consent in writing to the use of arbitration.<sup>93</sup> We can assume that bills have been or will be introduced in other states to circumvent federal law with specific requirements for consumer, health care, or employment disputes.<sup>94</sup>

If these efforts to limit the use of “mandatory” arbitration stall or fail, then other states may follow the California approach of tightening arbitration ethics. The California experience in sharpening application of new ethics Standards by distinguishing consumer arbitration requirements from those for commercial arbitration may be helpful. Other states may also benefit from having ethics Standards that have been tried and tested in California and will have a base from which they can make modifications and improvements.

The California Standards, although increasing paperwork and conflict tracking burdens,<sup>95</sup> may create more of a market for independent arbitrators, particularly in consumer cases where the disclosure requirements are most onerous for those affiliated with a national provider organization.<sup>96</sup> On the other hand, provider organizations may find that once they gear up to satisfy the California disclosure requirements, they also may as well implement the practices nationwide and embrace the changes, which have been labeled as “modest” by at least one commentator.<sup>97</sup>

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Rights Protections Act of 2001, H.R. 2282, 107th Cong. § 3 (2001); H.R. 815, 107th Cong. § 1(b) (2001); Consumer Credit Fair Dispute Resolution Act of 2001, S. 192, 107th Cong. § 2(b)(2) (2001).

<sup>93</sup> Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226 (2002).

<sup>94</sup> See, e.g., *Texas Bill Would Limit Mandatory Employment Arbitration Agreements* (Jan. 14, 2003) available at <http://www.adrworld.com>. Texas H.B. 371 (pre-filed Jan. 8, 2003) would prohibit employers from requiring at-will employees to agree to mandatory arbitration as a condition of employment. *Id.*

<sup>95</sup> New conflict tracking and checking computer software is now being marketed to California arbitrators. The marketing flyers refer to the “new legal landscape beginning the 1st of Jan. 2003,” and ask, “Are you ready for the clerical/reporting burden these changes will bring to your practice?” Software by design flyer, received Nov. 2002 (on file with author).

<sup>96</sup> Of course most boilerplate predispute arbitration clauses name a provider organization, but this too is under legislative attack. See A.B. 3029, *supra* note 66 (vetoed Sept. 30, 2002).

<sup>97</sup> Gail Hillerbrand, *California Ethics Standards for Neutral Arbitrators: A First Step in Consumer Protection*, DISP. RESOL. MAG., Fall 2002, at 12.



## VII. CONCLUSION

The stated goals of the new California ethics Standards are “to inform and protect participants in arbitration, and to promote public confidence in the arbitration process.”<sup>98</sup> The Standards were mandated by the legislature because there is increasing public concern about private justice. The new requirements in the Standards address some of these concerns. They fill the perceived need for publicly created standards to both protect users and avoid the appearance of conflicts of interest. Arbitration is a private process dependent on acceptance by the public, and on enforcement of awards by courts (and if necessary, by use of police power). The government, therefore, has a legitimate role and stake in the integrity of arbitration.

The Standards are troubling to arbitrators, provider organizations and businesses because they are burdensome and increase the potential for more disqualifications and vacatur, and perhaps more collateral litigation. The alternative, however, may be more oversight of the process by new regulatory agencies or courts. The California approach of disqualification and vacatur for failure to make required disclosures, and possibly for violation of the other ethics Standards, creates an efficient enforcement mechanism requiring no new government agency and placing the enforcement burden on those affected by violations, as well as putting a premium on prevention by those profiting from providing arbitration services. The more stringent disclosure requirements in consumer arbitrations reflect what is increasingly viewed as a public policy problem, perhaps deserving of reform or, at least, more industry recognition of the need to change current practices.

The push for arbitrator ethics standards is driven by a backlash to increased use of predispute arbitration clauses in employment, health care and consumer contracts. These clauses effectively restrict access to courts and attempt to limit class actions on behalf of claimants,<sup>99</sup> who are unlikely in great numbers to pursue individual arbitration proceedings or obtain lawyers to challenge arbitration clauses. The reform in California is consistent with the current focus on corporate responsibility and is more about balancing the “big picture” between powerful companies and consumers, employers and employees, health care organizations and patients, rather than about the fairness of specific arbitrations or the integrity of individual arbitrators. Unless the concerns about mandatory arbitration are

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<sup>98</sup> CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 17, § 1(a).

<sup>99</sup> *See supra* note 4.

addressed,<sup>100</sup> commercial arbitration between consenting equals could be adversely affected by the public backlash and arbitrators could be caught in the middle of a clash that is not their battle. For this reason, it is just possible that state sanctioned arbitrator ethics may be added to the list of phenomena that began in California, were viewed with curiosity (if not ridicule) by the rest of the country, and quickly spread from coast to coast.

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<sup>100</sup> There are also continuing efforts to address mandatory arbitration legislatively and judicially. *See supra* notes 62–67, 92–94. As this article was going to press, the Ninth Circuit Court of Appeals voted to order a hearing *en banc* to consider a challenge to a predispute arbitration clause required as a condition of employment at a law firm. *Ninth Circuit to Review Key Employment Arbitration Ruling* (Feb. 12, 2003), available at <http://www.adrworld.com> (discussing *Equal Emp. Opportunity Com. v. Luce, Forward, Hamilton & Scripps LLP*, No. 00-57222, 01-55321, 2003 WL 282178 (9th Cir. Feb. 7, 2003)).

APPENDIX

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**DIVISION VI. Ethics Standards for Neutral Arbitrators in  
Contractual Arbitration**

**Standard 1. Purpose, intent, and construction**

- (a) These standards are adopted under the authority of Code of Civil Procedure section 1281.85 and establish the minimum standards of conduct for neutral arbitrators who are subject to these standards. They are intended to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process.
- (b) For arbitration to be effective there must be broad public confidence in the integrity and fairness of the process. Arbitrators are responsible to the parties, the other participants, and the public for conducting themselves in accordance with these standards so as to merit that confidence.
- (c) These standards are to be construed and applied to further the purpose and intent expressed in subdivisions (a) and (b) and in conformance with all applicable law.
- (d) These standards are not intended to affect any existing civil cause of action or create any new civil cause of action.

**Comment to Standard 1**

Code of Civil Procedure section 1281.85 provides that, beginning July 1, 2002, a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics standards for arbitrators adopted by the Judicial Council pursuant to that section.

While the grounds for vacating an arbitration award are established by statute, not these standards, an arbitrator's violation of these standards may, under some circumstances, fall within one of those statutory grounds. (See Code Civ. Proc., § 1286.2.) A failure to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware is a ground for vacatur of the arbitrator's award. (See Code Civ. Proc., § 1286.2(a)(6)(A).) Violations of other obligations under these standards may also constitute grounds for vacating an

arbitration award under section 1286.2(a)(3) if “the rights of the party were substantially prejudiced” by the violation.

While vacatur may be an available remedy for violation of these standards, these standards are not intended to affect any civil cause of action that may currently exist nor to create any new civil cause of action. These standards are also not intended to establish a ceiling on what is considered good practice in arbitration or to discourage efforts to educate arbitrators about best practices.

## **Standard 2. Definitions**

As used in these standards:

### **(a) [Arbitrator and neutral arbitrator]**

(1) “Arbitrator” and “neutral arbitrator” mean any arbitrator who is subject to these standards and who is to serve impartially, whether selected or appointed:

(A) Jointly by the parties or by the arbitrators selected by the parties;

(B) By the court, when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them; or

(C) By a dispute resolution provider organization, under an agreement of the parties.

(2) Where the context includes events or acts occurring before an appointment is final, “arbitrator” and “neutral arbitrator” include a person who has been served with notice of a proposed nomination or appointment.

(b) “Applicable law” means constitutional provisions, statutes, decisional law, California Rules of Court, and other statewide rules or regulations that apply to arbitrators who are subject to these standards.

(c) “Conclusion of the arbitration” means the following:

## ARBITRATION ETHICS – APPENDIX

- (1) When the arbitrator is disqualified or withdraws or the case is settled or dismissed before the arbitrator makes an award, the date on which the arbitrator's appointment is terminated;
  - (2) When the arbitrator makes an award and no party makes a timely application to the arbitrator to correct the award, the final date for making an application to the arbitrator for correction; or
  - (3) When a party makes a timely application to the arbitrator to correct the award, the date on which the arbitrator serves a corrected award or a denial on each party, or the date on which denial occurs by operation of law.
- (d) "Consumer arbitration" means an arbitration conducted under a predispute arbitration provision contained in a contract that meets the criteria listed in paragraphs (1) through (3) below. "Consumer arbitration" excludes arbitration proceedings conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.
- (1) The contract is with a consumer party, as defined in these standards;
  - (2) The contract was drafted by or on behalf of the nonconsumer party; and
  - (3) The consumer party was required to accept the arbitration provision in the contract.
- (e) "Consumer party" is a party to an arbitration agreement who, in the context of that arbitration agreement, is any of the following:
- (1) An individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code;
  - (2) An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of section 1345 of

the Health and Safety Code or health-care insurance plan within the meaning of section 106 of the Insurance Code;

- (3) An individual with a medical malpractice claim that is subject to the arbitration agreement; or
  - (4) An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.
- (f) "Dispute resolution neutral" means a temporary judge appointed under article VI, section 21 of the California Constitution, a referee appointed under Code of Civil Procedure section 638 or 639, an arbitrator, a neutral evaluator, a special master, a mediator, a settlement officer, or a settlement facilitator.
  - (g) "Dispute resolution provider organization" and "provider organization" mean any nongovernmental entity that, or individual who, coordinates, administers, or provides the services of two or more dispute resolution neutrals.
  - (h) "Domestic partner" means a domestic partner as defined in Family Code section 297.
  - (i) "Financial interest" means a financial interest within the meaning of Code of Civil Procedure section 170.5.
  - (j) "Gift" means a gift as defined in Code of Civil Procedure section 170.9(l).
  - (k) "Honoraria" means honoraria as defined in Code of Civil Procedure section 170.9(h) and (i).
  - (l) "Lawyer in the arbitration" means the lawyer hired to represent a party in the arbitration.
  - (m) "Lawyer for a party" means the lawyer hired to represent a party in the arbitration and any lawyer or law firm currently associated in the practice of law with the lawyer hired to represent a party in the arbitration.

## ARBITRATION ETHICS – APPENDIX

- (n) “Member of the arbitrator’s immediate family” means the arbitrator’s spouse or domestic partner and any minor child living in the arbitrator’s household.
- (o) “Member of the arbitrator’s extended family” means the parents, grandparents, great-grandparents, children, grandchildren, greatgrandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or the arbitrator’s spouse or domestic partner or the spouse of such person.
- (p) **[Party]**
  - (1) “Party” means a party to the arbitration agreement:
    - (A) Who seeks to arbitrate a controversy pursuant to the agreement;
    - (B) Against whom such arbitration is sought; or
    - (C) Who is made a party to such arbitration by order of a court or the arbitrator upon such party’s application, upon the application of any other party to the arbitration, or upon the arbitrator’s own determination.
  - (2) “Party” includes the representative of a party, unless the context requires a different meaning.
- (q) “Party-arbitrator” means an arbitrator selected unilaterally by a party.
- (r) “Private practice of law” means private practice of law as defined in Code of Civil Procedure section 170.5.
- (s) “Significant personal relationship” includes a close personal friendship.

### Comment to Standard 2

Subdivision (a). The definition of “arbitrator” and “neutral arbitrator” in this standard is intended to include all arbitrators who are to serve in a neutral and impartial manner and to exclude unilaterally selected arbitrators.

Subdivisions (l) and (m). Arbitrators should take special care to note that there are two different terms used in these standards to refer to lawyers who represent parties in the arbitration. In particular, arbitrators should note that the term “lawyer for a party” includes any lawyer or law firm currently associated in the practice of law with the lawyer hired to represent a party in the arbitration.

Subdivision (p)(2). While this provision generally permits an arbitrator to provide required information or notices to a party’s attorney as that party’s representative, a party’s attorney should not be treated as a “party” for purposes of identifying matters that an arbitrator must disclose under standards 7 or 8, as those standards contain separate, specific requirements concerning the disclosure of relationships with a party’s attorney.

Other terms that may be pertinent to these standards are defined in Code of Civil Procedure section 1280.

### **Standard 3. Application and effective date**

- (a) Except as otherwise provided in this standard and standard 8, these standards apply to all persons who are appointed to serve as neutral arbitrators on or after July 1, 2002, in any arbitration under an arbitration agreement, if:
  - (1) The arbitration agreement is subject to the provisions of title 9 of part III of the Code of Civil Procedure (commencing with section 1280); or
  - (2) The arbitration hearing is to be conducted in California.
- (b) These standards do not apply to:
  - (1) Party arbitrators, as defined in these standards; or
  - (2) Any arbitrator serving in:
    - (A) An international arbitration proceeding subject to the provisions of title 9.3 of part III of the Code of Civil Procedure;



## **ARBITRATION ETHICS – APPENDIX**

- (B) A judicial arbitration proceeding subject to the provisions of chapter 2.5 of title 3 of part III of the Code of Civil Procedure;
  - (C) An attorney-client fee arbitration proceeding subject to the provisions of article 13 of chapter 4 of division 3 of the Business and Professions Code;
  - (D) An automobile warranty dispute resolution process certified under California Code of Regulations title 16, division 33.1;
  - (E) An arbitration of a workers' compensation dispute under Labor Code sections 5270 through 5277;
  - (F) An arbitration conducted by the Workers' Compensation Appeals Board under Labor Code section 5308;
  - (G) An arbitration of a complaint filed against a contractor with the Contractors State License Board under Business and Professions Code sections 7085 through 7085.7; or
  - (H) An arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.
- (c) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2002, are not subject to these standards in those arbitrations. Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to standard 8 in those arbitrations.

### **Comment to Standard 3**

With the exception of standard 8, these standards apply to all neutral arbitrators appointed on or after July 1, 2002, who meet the criteria of subdivision (a). Arbitration provider organizations, although not themselves subject to these standards, should be aware of them when performing administrative functions that involve arbitrators who are subject to these standards. A provider organization's policies and actions should facilitate, not impede, compliance with the standards by arbitrators who are affiliated with the provider organization.

**Standard 4. Duration of duty**

- (a) Except as otherwise provided in these standards, an arbitrator must comply with these ethics standards from acceptance of appointment until the conclusion of the arbitration.
- (b) If, after the conclusion of the arbitration, a case is referred back to the arbitrator for reconsideration or rehearing, the arbitrator must comply with these ethics standards from the date the case is referred back to the arbitrator until the arbitration is again concluded.

**Standard 5. General duty**

An arbitrator must act in a manner that upholds the integrity and fairness of the arbitration process. He or she must maintain impartiality toward all participants in the arbitration at all times.

**Comment to Standard 5**

This standard establishes the overarching ethical duty of arbitrators. The remaining standards should be construed as establishing specific requirements that implement this overarching duty in particular situations.

Maintaining impartiality toward all participants during all stages of the arbitration is central to upholding the integrity and fairness of the arbitration. An arbitrator must perform his or her duties impartially, without bias or prejudice, and must not, in performing these duties, by words or conduct manifest partiality, bias, or prejudice, including but not limited to partiality, bias, or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or the fact that a party might select the arbitrator to serve as an arbitrator in additional cases. After accepting appointment, an arbitrator should avoid entering into any relationship or acquiring any interest that might reasonably create the appearance of partiality, bias, or prejudice. An arbitrator does not become partial, biased, or prejudiced simply by having acquired knowledge of the parties, the issues or arguments, or the applicable law.

**Standard 6. Duty to refuse appointment**

Notwithstanding any contrary request, consent, or waiver by the parties, a proposed arbitrator must decline appointment if he or she is not able to be impartial.

## Standard 7. Disclosure

- (a) **[Intent]** This standard is intended to identify the matters that must be disclosed by a person nominated or appointed as an arbitrator. To the extent that this standard addresses matters that are also addressed by statute, it is intended to include those statutory disclosure requirements, not to eliminate, reduce, or otherwise limit them.
- (b) **[General provisions]** For purposes of this standard:
  - (1) (*Collective bargaining cases excluded*) The terms “cases” and “any arbitration” do not include collective bargaining cases or arbitrations conducted under or arising out of collective bargaining agreements between employers and employees or between their respective representatives.
  - (2) (*Offers of employment or professional relationship*) If an arbitrator has disclosed to the parties in an arbitration that he or she will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by subdivision (b) of standard 12, the arbitrator is not required to disclose to the parties in that arbitration any such offer from a party or lawyer for a party that he or she subsequently receives or accepts while that arbitration is pending.
  - (3) (*Names of parties in cases*) When making disclosures about other pending or prior cases, in order to preserve confidentiality, it is sufficient to give the name of any party who is not a party to the pending arbitration as “claimant” or “respondent” if the party is an individual and not a business or corporate entity.
- (c) **[Time and manner of disclosure]** Within ten calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing all matters listed in subdivisions (d) and (e) of this standard of which the arbitrator is then aware. If an arbitrator subsequently becomes aware of a matter that must be disclosed under either subdivision (d) or (e) of this standard, the arbitrator must disclose that matter to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter.

(d) **[Required disclosures]** A person who is nominated or appointed as an arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial, including all of the following:

(1) (*Family relationships with party*) The arbitrator or a member of the arbitrator's immediate or extended family is a party, a party's spouse or domestic partner, or an officer, director, or trustee of a party.

(2) (*Family relationships with lawyer in the arbitration*) The arbitrator, or the spouse, former spouse, domestic partner, child, sibling, or parent of the arbitrator or the arbitrator's spouse or domestic partner is:

(A) A lawyer in the arbitration;

(B) The spouse or domestic partner of a lawyer in the arbitration;  
or

(C) Currently associated in the private practice of law with a lawyer in the arbitration.

(3) (*Significant personal relationship with party or lawyer for a party*) The arbitrator or a member of the arbitrator's immediate family has or has had a significant personal relationship with any party or lawyer for a party.

(4) (*Service as arbitrator for a party or lawyer for party*)

(A) The arbitrator is serving or, within the preceding five years, has served:

(i) As a neutral arbitrator in another prior or pending noncollective bargaining case involving a party to the current arbitration or a lawyer for a party.

## **ARBITRATION ETHICS – APPENDIX**

- (ii) As a party-appointed arbitrator in another prior or pending noncollective bargaining case for either a party to the current arbitration or a lawyer for a party.
  - (iii) As a neutral arbitrator in another prior or pending noncollective bargaining case in which he or she was selected by a person serving as a party-appointed arbitrator in the current arbitration
- (B) [Case information] If the arbitrator is serving or has served in any of the capacities listed under (A), he or she must disclose:
  - (i) The names of the parties in each prior or pending case and, where applicable, the name of the attorney representing the party in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case.
  - (ii) The results of each prior case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.
- (C) [Summary of case information] If the total number of the cases disclosed under (A) is greater than five, the arbitrator must provide a summary of these cases that states:
  - (i) The number of pending cases in which the arbitrator is currently serving in each capacity;
  - (ii) The number of prior cases in which the arbitrator previously served in each capacity;
  - (iii) The number of prior cases arbitrated to conclusion; and
  - (iv) The number of such prior cases in which the party to the current arbitration, the party represented by the lawyer for a party in the current arbitration or the party

represented by the party-arbitrator in the current arbitration was the prevailing party.

- (5) (*Compensated service as other dispute resolution neutral*) The arbitrator is serving or has served as a dispute resolution neutral other than an arbitrator in another pending or prior noncollective bargaining case involving a party or lawyer for a party and the arbitrator received or expects to receive any form of compensation for serving in this capacity.
- (A) [Time frame] For purposes of this paragraph (5), “prior case” means any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator’s proposed nomination or appointment, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002.
- (B) [Case information] If the arbitrator is serving or has served in any of the capacities listed under this paragraph (5), he or she must disclose:
- (i) The names of the parties in each prior or pending case and, where applicable, the name of the attorney in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case;
  - (ii) The dispute resolution neutral capacity (mediator, referee, etc.) in which the arbitrator is serving or served in the case; and
  - (iii) In each such case in which the arbitrator rendered a decision as a temporary judge or referee, the date of the decision, the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties’ attorneys.
- (C) [Summary of case information] If the total number of cases disclosed under this paragraph (5) is greater than five, the

## ARBITRATION ETHICS – APPENDIX

arbitrator must also provide a summary of the cases that states:

- (i) The number of pending cases in which the arbitrator is currently serving in each capacity;
  - (ii) The number of prior cases in which the arbitrator previously served in each capacity;
  - (iii) The number of prior cases in which the arbitrator rendered a decision as a temporary judge or referee; and
  - (iv) The number of such prior cases in which the party to the current arbitration or the party represented by the lawyer for a party in the current arbitration was the prevailing party.
- (6) (*Current arrangements for prospective neutral service*) Whether the arbitrator has any current arrangement with a party concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in or, within the last two years, has participated in discussions regarding such prospective employment or service with a party.
- (7) (*Attorney-client relationships*) Any attorney-client relationship the arbitrator has or has had with a party or lawyer for a party. Attorney-client relationships include the following:
- (A) An officer, a director, or a trustee of a party is or, within the preceding two years, was a client of the arbitrator in the arbitrator's private practice of law or a client of a lawyer with whom the arbitrator is or was associated in the private practice of law;
  - (B) In any other proceeding involving the same issues, the arbitrator gave advice to a party or a lawyer in the arbitration concerning any matter involved in the arbitration; and
  - (C) The arbitrator served as a lawyer for or as an officer of a public agency which is a party and personally advised or in

any way represented the public agency concerning the factual or legal issues in the arbitration.

- (8) (*Other professional relationships*) Any other professional relationship not already disclosed under paragraphs (2)-(7) that the arbitrator or a member of the arbitrator's immediate family has or has had with a party or lawyer for a party, including the following:
- (A) The arbitrator was associated in the private practice of law with a lawyer in the arbitration within the last two years.
  - (B) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party; and
  - (C) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a lawyer in the arbitration.
- (9) (*Financial interests in party*) The arbitrator or a member of the arbitrator's immediate family has a financial interest in a party.
- (10) (*Financial interests in subject of arbitration*) The arbitrator or a member of the arbitrator's immediate family has a financial interest in the subject matter of the arbitration.
- (11) (*Affected interest*) The arbitrator or a member of the arbitrator's immediate family has an interest that could be substantially affected by the outcome of the arbitration.
- (12) (*Knowledge of disputed facts*) The arbitrator or a member of the arbitrator's immediate or extended family has personal knowledge of disputed evidentiary facts relevant to the arbitration. A person who is likely to be a material witness in the proceeding is deemed to have personal knowledge of disputed evidentiary facts concerning the proceeding.



## ARBITRATION ETHICS – APPENDIX

- (13) (*Membership in organizations practicing discrimination*) The arbitrator's membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation. Membership in a religious organization, an official military organization of the United States, or a nonprofit youth organization need not be disclosed unless it would interfere with the arbitrator's proper conduct of the proceeding or would cause a person aware of the fact to reasonably entertain a doubt concerning the arbitrator's ability to act impartially.
- (14) Any other matter that:
- (A) Might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial;
  - (B) Leads the proposed arbitrator to believe there is a substantial doubt as to his or her capacity to be impartial, including, but not limited to, bias or prejudice toward a party, lawyer, or law firm in the arbitration; or
  - (C) Otherwise leads the arbitrator to believe that his or her disqualification will further the interests of justice.
- (e) **[Inability to conduct or timely complete proceedings]** In addition to the matters that must be disclosed under subdivision (d), an arbitrator must also disclose:
- (1) If the arbitrator is not able to properly perceive the evidence or properly conduct the proceedings because of a permanent or temporary physical impairment; and
  - (2) Any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner.
- (f) **[Continuing duty]** An arbitrator's duty to disclose the matters described in subdivisions (d) and (e) of this standard is a continuing duty, applying from service of the notice of the arbitrator's proposed

nomination or appointment until the conclusion of the arbitration proceeding.

### Comment to Standard 7

This standard requires arbitrators to disclose to all parties, in writing within 10 days of service of notice of their proposed nomination or appointment, all matters they are aware of at that time that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial and to disclose any additional such matters within 10 days of becoming aware of them.

Timely disclosure to the parties is the primary means of ensuring the impartiality of an arbitrator. It provides the parties with the necessary information to make an informed selection of an arbitrator by disqualifying or ratifying the proposed arbitrator following disclosure. See also standard 10, concerning disclosure and disqualification requirements relating to concurrent and subsequent employment or professional relationships between an arbitrator and a party or attorney in the arbitration. A party may disqualify an arbitrator for failure to comply with statutory disclosure obligations (see Code Civ. Proc., § 1281.91(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of which the arbitrator was then aware is a ground for *vacatur* of the arbitrator's award (see Code Civ. Proc., § 1286.2(a)(6)(A)).

The arbitrator's overarching duty under this standard, which mirrors the duty set forth in Code of Civil Procedure section 1281.9, is to inform parties about matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial. While the remaining subparagraphs of (d) require the disclosure of specific interests, relationships, or affiliations, these are only examples of common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The absence of the particular interests, relationships, or affiliations listed in the subparagraphs does not necessarily mean that there is no matter that could reasonably raise a question about the arbitrator's ability to be impartial and that therefore must be disclosed. An arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under paragraph (d).

Code of Civil Procedure section 1281.85 specifically requires that the ethical standards adopted by the Judicial Council address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity. Section 1281.85 further provides that the standards "shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit

## ARBITRATION ETHICS – APPENDIX

the disclosure and disqualification requirements established by this chapter [chapter 2 of title 9 of part III, Code of Civil Procedure, sections 1281–1281.95].”

Code of Civil Procedure section 1281.9 already establishes detailed requirements concerning disclosures by arbitrators, including a specific requirement that arbitrators disclose the existence of any ground specified in Code of Civil Procedure section 170.1 for disqualification of a judge.

This standard does not eliminate or otherwise limit those requirements; in large part, it simply consolidates and integrates those existing statutory disclosure requirements by topic area. This standard does, however, expand upon or clarify the existing statutory disclosure requirements in the following ways:

- Requiring arbitrators to disclose to the parties any matter about which they become aware after the time for making an initial disclosure has expired, within 10 calendar days after the arbitrator becomes aware of the matter (subdivision (f)).
- Expanding required disclosures about the relationships or affiliations of an arbitrator’s family members to include those of an arbitrator’s domestic partner (subdivisions (d)(1) and (2); see also definitions of immediate and extended family in standard 2).
- Requiring arbitrators, in addition to making statutorily required disclosures regarding prior service as an arbitrator for a party or attorney for a party, to disclose prior services both as neutral arbitrator selected by a party arbitrator in the current arbitration and as any other type of dispute resolution neutral for a party or attorney in the arbitration (e.g., temporary judge, mediator, or referee) (subdivisions (d)(4)(C) and (5)).
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is or was an employee, expert witness, or consultant for a party or a lawyer in the arbitration (subdivisions (d)(8)(A) and (B)).
- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family has an interest that could be substantially affected by the outcome of the arbitration (subdivision (d)(11)).
- If a disclosure includes information about five or more cases, requiring arbitrators to provide a summary of that information (subdivisions (d)(4) and (5)).
- Requiring arbitrators to disclose membership in organizations that practice invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation (subdivision (d)(13)).
- Requiring the arbitrator to disclose any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner (subdivision (d)).

- Clarifying that the duty to make disclosures is a continuing obligation, requiring disclosure of matters that were not known at the time of nomination or appointment but that become known afterward (subdivision (e)).

It is good practice for an arbitrator to ask each participant to make an effort to disclose any matters that may affect the arbitrator's ability to be impartial.

### **Standard 8. Additional disclosures in consumer arbitrations administered by a provider organization**

#### **(a) [General provisions]**

- (1) *(Reliance on information provided by provider organization).* Except as to the information in (c)(1), an arbitrator may rely on information supplied by the administering provider organization in making the disclosures required by this standard. If the information that must be disclosed is available on the Internet, the arbitrator may comply with the obligation to disclose this information by providing the Internet address at which the information is located and notifying the party that the arbitrator will supply hard copies of this information upon request.
- (2) *(Reliance on representation that not a consumer arbitration)* An arbitrator is not required to make the disclosures required by this standard if he or she reasonably believes that the arbitration is not a consumer arbitration based on reasonable reliance on a consumer party's representation that the arbitration is not a consumer arbitration.

#### **(b) [Additional disclosures required]** In addition to the disclosures required under standard 7, in a consumer arbitration as defined in standard 2 in which a dispute resolution provider organization is coordinating, administering, or providing the arbitration services, a person who is nominated or appointed as an arbitrator on or after January 1, 2003 must disclose the following within the time and in the same manner as the disclosures required under standard 7(c):

- (1) *(Relationships between the provider organization and party or lawyer in arbitration)* Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider

## ARBITRATION ETHICS – APPENDIX

organization and a party or lawyer in the arbitration. Information that must be disclosed under this standard includes:

- (A) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of the provider organization.
  - (B) Within the preceding two years the provider organization has received a gift, bequest, or favor from a party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated.
  - (C) The provider organization has entered into, or the arbitrator currently expects that the provider organization will enter into, an agreement or relationship with any party or lawyer in the arbitration or a law firm with which a lawyer in the arbitration is currently associated under which the provider organization will administer, coordinate, or provide dispute resolution services in other non-collective bargaining matters or will provide other consulting services for that party, lawyer, or law firm.
  - (D) The provider organization is coordinating, administering, or providing dispute resolution services or has coordinated, administered, or provided such services in another pending or prior noncollective bargaining case in which a party or lawyer in the arbitration was a party or a lawyer. For purposes of this paragraph, “prior case” means a case in which the dispute resolution neutral affiliated with the provider organization concluded his or her service within the two years before the date of the arbitrator’s proposed nomination or appointment, but does not include any case in which the dispute resolution neutral concluded his or her service before July 1, 2002.
- (2) (*Case information*) If the provider organization is acting or has acted in any of the capacities described in paragraph (1)(D), the arbitrator must disclose:
- (A) The names of the parties in each prior or pending case and, where applicable, the name of the attorney in the current

arbitration who is involved in the pending case or who was involved in the prior case;

- (B) The type of dispute resolution services (arbitration, mediation, reference, etc.) coordinated, administered, or provided by the provider organization in the case; and
  - (C) In each prior case in which a dispute resolution neutral affiliated with the provider organization rendered a decision as an arbitrator, a temporary judge appointed under article VI, § 4 of the California Constitution, or a referee appointed under Code of Civil Procedure sections 638 or 639, the date of the decision, the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.
- (3) (*Summary of case information*) If the total number of cases disclosed under paragraph (1)(D) is greater than five, the arbitrator must also provide a summary of these cases that states:
- (A) The number of pending cases in which the provider organization is currently providing each type of dispute resolution services;
  - (B) The number of prior cases in which the provider organization previously provided each type of dispute resolution services;
  - (C) The number of such prior cases in which a neutral affiliated with the provider organization rendered a decision as an arbitrator, a temporary judge, or a referee; and
  - (D) The number of prior cases in which the party to the current arbitration or the party represented by the lawyer in the current arbitration was the prevailing party.
- (c) **[Relationship between provider organization and arbitrator].** If a relationship or affiliation is disclosed under paragraph (b), the arbitrator must also provide information about the following:

## ARBITRATION ETHICS – APPENDIX

- (1) Any financial relationship or affiliation the arbitrator has with the provider organization other than receiving referrals of cases, including whether the arbitrator has a financial interest in the provider organization or is an employee of the provider organization;
  - (2) The provider organization's process and criteria for recruiting, screening, and training the panel of arbitrators from which the arbitrator in this case is to be selected;
  - (3) The provider organization's process for identifying, recommending, and selecting potential arbitrators for specific cases; and
  - (4) Any role the provider organization plays in ruling on requests for disqualification of the arbitrator.
- (d) **[Effective date]** The provisions of this standard take effect on January 1, 2003. Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to this standard in those pending arbitrations.

### Comment to Standard 8

This standard only applies in consumer arbitrations in which a dispute resolution provider organization is administering the arbitration. Like standard 7, this standard expands upon the existing statutory disclosure requirements. Code of Civil Procedure section 1281.95 requires arbitrators in certain construction defect arbitrations to make disclosures concerning relationships between their employers or arbitration services and the parties in the arbitration. This standard requires arbitrators in all consumer arbitrations to disclose any financial or professional relationship between the administering provider organization and any party, attorney, or law firm in the arbitration and, if any such relationship exists, then the arbitrator must also disclose his or her relationship with the dispute resolution provider organization. This standard does not require an arbitrator to disclose if the provider organization has a financial interest in a party or lawyer in the arbitration or if a party or lawyer in the arbitration has a financial interest in the provider organization because provider organizations are prohibited under Code of Civil Procedure section 1281.92 from administering any consumer arbitration where any such relationship exists.

Subdivision (b). Currently expected relationships or affiliations that must be disclosed include all relationships or affiliations that the arbitrator, at the time the disclosure is made, expects will be formed. For example, if the arbitrator knows that

the administering provider organization has agreed in concept to enter into a business relationship with a party, but they have not yet signed a written agreement formalizing that relationship, this would be a “currently expected” relationship that the arbitrator would be required to disclose.

**Standard 9. Arbitrators’ duty to inform themselves about matters to be disclosed**

- (a) **[General duty to inform him or herself]** A person who is nominated or appointed as an arbitrator must make a reasonable effort to inform himself or herself of matters that must be disclosed under standards 7 and 8.
- (b) **[Obligation regarding extended family]** An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships or other matters involving his or her extended family and former spouse that are required to be disclosed under standard 7 by:
  - (1) Seeking information about these relationships and matters from the members of his or her immediate family and any members of his or her extended family living in his or her household; and
  - (2) Declaring in writing that he or she has made the inquiry in (1).
- (c) **[Obligation regarding relationships with associates of lawyer in the arbitration]** An arbitrator can fulfill the obligation under this standard to inform himself or herself of relationships with any lawyer associated in the practice of law with the lawyer in the arbitration that are required to be disclosed under standard 7 by:
  - (1) Informing the lawyer in the arbitration, in writing, of all such relationships within the arbitrator’s knowledge and asking the lawyer if the lawyer is aware of any other such relationships;
  - (2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the lawyer in the arbitration.
- (d) **[Obligation regarding service as a neutral other than an arbitrator before July 1, 2002]** An arbitrator can fulfill the



## ARBITRATION ETHICS – APPENDIX

obligation under this standard to inform himself or herself of his or her service as a dispute resolution neutral other than as an arbitrator in cases that commenced prior to July 1, 2002 by:

- (1) Asking any dispute resolution provider organization that administered those prior services for this information; and
  - (2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the provider organization.
- (e) [Obligation regarding relationships with provider organization]**  
An arbitrator can fulfill his or her obligation under this standard to inform himself or herself of the information that is required to be disclosed under standard 8 by:
- (1) Asking the dispute resolution provider organization for this information; and
  - (2) Declaring in writing that he or she has made the inquiry in (1) and attaching to this declaration copies of his or her inquiry and any response from the provider organization.

### Comment to Standard 9

This standard expands arbitrators existing duty of reasonable inquiry that applies with respect to financial interests under Code of Civil Procedure section 170.1(a)(3), to require arbitrators to make a reasonable effort to inform themselves about all matters that must be disclosed. This standard also clarifies what constitutes a reasonable effort by an arbitrator to inform himself or herself about specified matters, including relationships or other matters concerning his or her extended family and relationships with attorneys associated in the practice of law with the attorney in the arbitration (such as associates encompassed within the term “lawyer for a party”).

### Standard 10. Disqualification

- (a)** An arbitrator is disqualified if:
- (1) The arbitrator fails to comply with his or her obligation to make disclosures and a party serves a notice of disqualification in the

manner and within the time specified in Code of Civil Procedure section 1281.91;

- (2) The arbitrator complies with his or her obligation to make disclosures within 10 calendar days of service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91;
  - (3) The arbitrator makes a required disclosure more than 10 calendar days after service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91; or
  - (4) A party becomes aware that an arbitrator has made a material omission or material misrepresentation in his or her disclosure and, within 15 days after becoming aware of the omission or misrepresentation and within the time specified in Code of Civil Procedure section 1281.91(c), the party serves a notice of disqualification that clearly describes the material omission or material misrepresentation and how and when the party became aware of this omission or misrepresentation; or
  - (5) If any ground specified in Code of Civil Procedure section 170.1 exists and the party makes a demand that the arbitrator disqualify himself or herself in the manner and within the time specified in Code of Civil Procedure section 1281.91(d).
- (b) For purposes of this standard, “obligation to make disclosure” means an arbitrator’s obligation to make disclosures under standards 7 or 8 or Code of Civil Procedure section 1281.9.
- (c) Notwithstanding any contrary request, consent, or waiver by the parties, an arbitrator must disqualify himself or herself if he or she concludes at any time during the arbitration that he or she is not able to conduct the arbitration impartially.

## **ARBITRATION ETHICS – APPENDIX**

### **Comment to Standard 10**

Code of Civil Procedure section 1281.91 already establishes requirements concerning disqualification of arbitrators. This standard does not eliminate or otherwise limit those requirements or change existing authority or procedures for challenging an arbitrator's failure to disqualify himself or herself. The provisions of subdivisions (a)(1), (2), and (5) restate existing disqualification procedures under section 1281.91; (b) and (d) when an arbitrator makes, or fails to make, initial disclosures or where a section 170.1 ground exists. The provisions of subdivisions (a)(3) and (4) clarify the requirements relating to disqualification based on disclosure made by the arbitrator after appointment or based on the discovery by the party of a material omission or misrepresentation in the arbitrator's disclosure.

### **Standard 11. Duty to refuse gift, bequest, or favor**

- (a)** An arbitrator must not, under any circumstances, accept a gift, bequest, favor, or honoraria from a party or any other person or entity whose interests are reasonably likely to come before the arbitrator in the arbitration.
- (b)** From service of notice of appointment or appointment until two years after the conclusion of the arbitration, an arbitrator must not, under any circumstances, accept a gift, bequest, favor, or honoraria from a party or any other person or entity whose interests have come before the arbitrator in the arbitration.
- (c)** An arbitrator must discourage members of his or her family residing in his or her household from accepting a gift, bequest, favor, or honoraria that the arbitrator would be prohibited from accepting under subdivisions (a) or (b).
- (d)** This standard does not prohibit an arbitrator from demanding or receiving a fee for services or expenses.

### **Comment to Standard 11**

Gifts and favors do not include any rebate or discount made available in the regular course of business to members of the public.

**Standard 12. Duties and limitations regarding future professional relationships or employment**

- (a) **[Offers as lawyer, expert witness, or consultant]** From the time of appointment until the conclusion of the arbitration, an arbitrator must not entertain or accept any offers of employment or new professional relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer for a party in the pending arbitration.
- (b) **[Offers for other employment or professional relationships]** In addition to the disclosures required by standards 7 and 8, within ten calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing if, while that arbitration is pending, he or she will entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case. A party may disqualify the arbitrator based on this disclosure by serving a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91(b).
- (c) **[Acceptance of offers prohibited unless intent disclosed]** If an arbitrator fails to make the disclosure required by subdivision (b) of this standard, from the time of appointment until the conclusion of the arbitration the arbitrator must not entertain or accept any such offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral.
- (d) **[Relationships and use of confidential information related to the arbitrated case]** An arbitrator must not at any time:
  - (1) Without the informed written consent of all parties, enter into any professional relationship or accept any professional employment as a lawyer, an expert witness, or a consultant relating to the case arbitrated; or
  - (2) Without the informed written consent of the party, enter into any professional relationship or accept employment in another matter in which information that he or she has received in confidence

from a party by reason of serving as an arbitrator in a case is material.

### **Standard 13. Conduct of proceeding**

- (a) An arbitrator must conduct the arbitration fairly, promptly, and diligently and in accordance with the applicable law relating to the conduct of arbitration proceedings.
- (b) In making the decision, an arbitrator must not be swayed by partisan interests, public clamor, or fear of criticism.

#### **Comment to Standard 13**

Subdivision (a). The arbitrator's duty to dispose of matters promptly and diligently must not take precedence over the arbitrator's duty to dispose of matters fairly.

Conducting the arbitration in a procedurally fair manner includes conducting a balanced process in which each party is given an opportunity to participate. When one but not all parties are unrepresented, an arbitrator must ensure that the party appearing without counsel has an adequate opportunity to be heard and involved. Conducting the arbitration promptly and diligently requires expeditious management of all stages of the proceeding and concluding the case as promptly as the circumstances reasonably permit. During an arbitration, an arbitrator may discuss the issues, arguments, and evidence with the parties or their counsel, make interim rulings, and otherwise to control or direct the arbitration. This standard is not intended to restrict these activities.

The arbitrator's duty to uphold the integrity and fairness of the arbitration process includes an obligation to make reasonable efforts to prevent delaying tactics, harassment of any participant, or other abuse of the arbitration process. It is recognized, however, that the arbitrator's reasonable efforts may not successfully control all conduct of the participants.

For the general law relating to the conduct of arbitration proceedings, see chapter 3 of title 9 of part III of the Code of Civil Procedure, sections 1282–1284.2, relating to the conduct of arbitration proceedings. See also Code of Civil Procedure section 1286.2 concerning an arbitrator's unreasonable refusal to grant a continuance as grounds for *vacatur* of the award.

### **Standard 14. Ex parte communications**

- (a) An arbitrator must not initiate, permit, or consider any ex parte communications or consider other communications made to the

arbitrator outside the presence of all of the parties concerning a pending or impending arbitration, except as permitted by this standard, by agreement of the parties, or by applicable law.

- (b) An arbitrator may communicate with a party in the absence of other parties about administrative matters, such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings, as long as the arbitrator reasonably believes that the communication will not result in a procedural or tactical advantage for any party. When such a discussion occurs, the arbitrator must promptly inform the other parties of the communication and must give the other parties an opportunity to respond before making any final determination concerning the matter discussed.
- (c) An arbitrator may obtain the advice of a disinterested expert on the subject matter of the arbitration if the arbitrator notifies the parties of the person consulted and the substance of the advice and affords the parties a reasonable opportunity to respond.

#### **Comment to Standard 14**

See also Code of Civil Procedure sections 1282.2(e) regarding the arbitrator's authority to hear a matter when a party fails to appear and 1282.2(g) regarding the procedures that must be followed if an arbitrator intends to base an award on information not obtained at the hearing.

#### **Standard 15. Confidentiality**

- (a) An arbitrator must not use or disclose information that he or she received in confidence by reason of serving as an arbitrator in a case to gain personal advantage. This duty applies from acceptance of appointment and continues after the conclusion of the arbitration.
- (b) An arbitrator must not inform anyone of the award in advance of the time that the award is given to all parties. This standard does not prohibit an arbitrator from providing all parties with a tentative or draft decision for review or from providing an award to an assistant or to the provider organization that is coordinating, administering, or providing the arbitration services in the case for purposes of copying and distributing the award to all parties.

**Standard 16. Compensation**

- (a) An arbitrator must not charge any fee for services or expenses that is in any way contingent on the result or outcome of the arbitration.
- (b) Before accepting appointment, an arbitrator, a dispute resolution provider organization, or another person or entity acting on the arbitrator's behalf must inform all parties in writing of the terms and conditions of the arbitrator's compensation. This information must include any basis to be used in determining fees and any special fees for cancellation, research and preparation time, or other purposes.

**Standard 17. Marketing**

- (a) An arbitrator must be truthful and accurate in marketing his or her services and must not make any representation that directly or indirectly implies favoritism or a specific outcome. An arbitrator must ensure that his or her personal marketing activities and any activities carried out on his or her behalf, including any activities of a provider organization with which the arbitrator is affiliated, comply with this requirement.
- (b) An arbitrator must not solicit business from a participant in the arbitration while the arbitration is pending.

**Comment to Standard 17**

Subdivision (b). This provision is not intended to prohibit an arbitrator from accepting another arbitration from a party or attorney in the arbitration while the first matter is pending, as long as the arbitrator complies with the provisions of standard 12 and there was no express solicitation of this business by the arbitrator.

**Drafter's Notes**

Standards 1–17 implement Code of Civil Procedure section 1281.85, which requires the Judicial Council to adopt ethics standards for all neutral arbitrators serving in arbitrations pursuant to an arbitration agreement. Among other things, they address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, the acceptance of gifts, the establishment of future professional relationships, ex-parte communication, fees, and marketing.

